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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 194

MARYLAND CASUALTY COMPANY, PETITIONER,

vs.

PACIFIC COAL & OIL COMPANY, AND JOE ORTECA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 1, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 7, 1940.

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

No. 5760. Equity

MARYLAND CASUALTY COMPANY, a Corporation,

vs.

PACIFIC COAL & OIL COMPANY and JOE ORTECA

[fol. 2] PETITION FOR DECLARATORY JUDGMENT—Filed August 3, 1938

Now comes the Maryland Casualty Company and avers that it is a corporation organized and existing under and by virtue of the laws of the State of Maryland and qualified to do an insurance business in the State of Ohio, having its principal place of business in said state and being a citizen and resident thereof. Plaintiff complains of the defendants, Pacific Coal & Oil Company and Joe Orteca, both of whom are citizens and residents of the City of Cleveland and State of Ohio, and residents of the Eastern Division of the Northern District of Ohio.

Plaintiff avers that this action is brought under 28 U. S. C. A. 400, there being an actual controversy among the parties, and avers that this Court has jurisdiction, there being diversity of citizenship and the amount involved exceeding the sum and value of $3,000.00, exclusive of interest and costs.

Plaintiff further avers that it issued its policy of insurance No. 15-366825 to the defendant, Pacific Coal & Oil Company, wherein it was agreed upon certain conditions to pay on behalf of said insured all sums which said insured might become obligated to pay for bodily injuries caused by automobiles hired by it up to $10,000, and wherein it was likewise agreed to pay on behalf of said insured all sums which insured might become obligated to pay for damage to or destruction of property up to $5,000.00; avers that among the terms and conditions in said policy contained is the following, being a rider attached to and made a part of said policy:

"In Consideration of the premium herein provided for, and of the Named Assured's agreements herein contained, it is hereby understood and agreed by and between the Company and the Assured named in the Policy to which this Endorsement is attached, that the Policy, subject otherwise to all its terms, limits, conditions, and agreements, shall from and after the date hereof cover as to Public Liability or Public Liability and Property Damage all automobiles and trailers of the type stated in the Policy, hired by him during the Policy term and used for the purposes stated in the Policy, without a specific description of, and specific premium charge for, each automobile to be covered as required by the Policy, excluding, however, automobiles and trailers owned by employees who are paid a specific operating allowance of any kind, for the use of their automobiles in the [fol. 3] Named Assured's business (operating allowance meaning rate per mile; gas, oil, tire or upkeep allowance; where the salary, commission or terms of employment contemplate the use of an automobile or motorcycle), and excluding automobiles or trailers owned by a partner if the Assured is a partnership or by an officer if the Assured is a corporation.

"The Named Assured shall upon delivery of the Policy pay to the Company an advance premium computed on the basis of the amount estimated by the Named Assured to be incurred for the hire of such automobiles and trailers during the Policy term, applied to the rates indicated in the Schedule below. The earned premium for this Endorsement shall be adjusted at the termination of the Policy, and shall be based upon the amount actually incurred (whether paid or not) by said Assured for the hire of such automobiles and trailers at the rates indicated in the Schedule per $100.00 of the incurred amount. If the premium so determined is greater than the advance premium, the Named Assured shall immediately pay the difference to the Company; if less, the Company shall return the unearned portion to the said Assured, but the Company shall in any event retain the minimum premium hereinafter stated.

"It is further understood and agreed, both for purposes of arriving at the advance premium and also of computing the actual earned premium, that the amount incurred by the Named Assured during the Policy term for the hire of automobiles and trailers shall include the wages of the said Assured's chauffeurs employed in operating the hired auto-

mobiles, provided such automobiles are hired without chauffeurs in attendance, and shall exclude any specific operating allowance paid to employees for the use of their own automobiles in the Named Assured's business.

"It is further understood and agreed that the Named Assured shall maintain for each location a complete and accurate record of the number and kind of automobiles and trailers hired, dates when they are hired, the amount incurred for such hire, and the names of the parties from whom such automobiles and trailers are hired.

"It is further understood and agreed that the Company or any of its duly authorized agents shall be permitted at any [fol. 4] reasonable time during the term of this insurance and within one year after its termination to audit and examine any and all of the Named Assured's records for the purpose of ascertaining the premium for this Endorsement, and the Company or its representatives shall also be permitted to inspect at any reasonable time the automobiles and trailers covered hereby.

"It is further understood and agreed that nothing herein or in the Policy contained shall extend the Policy to cover the legal liability of any individual, firm or corporation from whom automobiles and/or trailers covered hereunder shall have been hired. * * *"

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Plaintiff further avers that on or about the 24th day of February, 1936, a collision occurred between an automobile driven by the defendant, Joseph Orteca, and a 1931 one and a half ton Ford truck of the Pacific Coal & Oil Company operated by one of its said employees, as a result of which the defendant, Joe Orteca, claims to have sustained certain injuries and damage; avers that the defendant, Joe Orteca, has filed an action against the Pacific Coal & Oil Company in the Court of Common Pleas of Cuyahoga County, being Cause No. 473,131 and entitled "Joe Orteca, Plaintiff, v. the Pacific Coal & Oil Company, Defendant," wherein judgment is prayed for in the amount of $25,250.00 for injuries and damage resulting from said collision.

Plaintiff further avers that the defendant, Pacific Coal & Oil Company, claims to have sold said 1931 truck, prior to the collision above referred to, to its employee who was then operating said truck, retaining title, however, to said truck as security for the payment of the purchase price

thereof; avers that if said 1931 Ford truck was owned by the Pacific Coal & Oil Company at the time of said collision plaintiff has no obligation under its policy No. 15-366825 for or arising out of the collision above referred to; avers that if said 1931 Ford truck was a hired automobile within the meaning of the terms of the rider attached to and made a part of said policy No. 15-366825 then plaintiff would be obligated to defend the said Pacific Coal & Oil Company in the action pending in the Court of Common Pleas of Cuyahoga County and would be liable under its policy to pay any judgment which might be recovered in said action within the limits of its coverage.

Plaintiff further avers that there is an actual controversy between plaintiff and the defendants as to its obligation under said policy; avers that said controversy in- [fol. 5] volves the question of whether or not said 1931 Ford truck involved in the collision above referred to was a hired automobile within the meaning of the above quoted policy provision; avers that upon the facts and the policy provisions above stated plaintiff does not know whether it is obligated to defend the said Pacific Coal & Oil Company in the action pending in the Cuyahoga County Court of Common Pleas, and therefore asks to have its rights determined.

Plaintiff further avers that, pending the determination of the issue herein presented, it is entitled to an order which will restrain and enjoin the defendants from proceeding with the trial of the issues presented in their case aforesaid pending in the Court of Common Pleas of Cuyahoga County, in the absence of which the plaintiff herein may and will suffer irreparable loss and damage for which it has no adequate remedy at law.

Wherefore plaintiff prays that this court adjudge whether or not it is obligated under its said policy and declare the rights of the parties herein; that a temporary restraining order or a temporary injunction, or both, upon appropriate application or applications be granted whereby, pending the final determination of this cause, the defendants will be restrained and enjoined from proceeding with the trial of the issues between them in the cause pending in the Common Pleas Court of Cuyahoga County, being Case No. 473,131, and entitled "Joe Orteca, Plaintiff, vs. the Pacific Coal & Oil Company, Defendant"; and for such other and further relief as is just and equitable in the premises, including a

judgment for the costs assessable and later assessed in this action.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff.

(Duly Verified.)

[fol. 6] IN UNITED STATES DISTRICT COURT

DEMURRER BY JOE ORTECA TO THE PETITION OF PLAINTIFF—Filed August 15, 1938

The defendant, Joe Orteca, now comes and respectfully demurs to the petition for Declaratory judgment herein filed, for the reason that no cause for action is stated in said petition as against him and also for the reason that he is not a necessary or proper party to said action.

By G. E. Romano and E. J. Thobaben, Attorneys for Joe Orteca.

NOTICE

Plaintiff will take notice that defendant Joe Orteca has filed his demurrer to plaintiff's petition and that the same will be heard by the Court under the rules of said Court.

G. E. Romano, E. J. Thobaben, Attorneys for Defendant, Joe Orteca.

Notice of the filing of the foregoing demurrer is hereby acknowledged by receipt of copy of said notice and the demurrer.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

ANSWER OF DEFENDANT, PACIFIC COAL & OIL COMPANY—Filed August 17, 1938

Now comes the Defendant, Pacific Coal & Oil Company, and avers that it is a corporation organized and existing

under the laws of the State of Ohio, and admits the following:

[fol. 7] The corporate existence of the Plaintiff and its authority to do business in the State of Ohio;

The residence of its co-defendant;

That there was issued to it policy referred to in said Petition containing the terms and conditions shown in the rider attached to said policy and as set forth in Plaintiff's Petition;

That there is a diversity of citizenship involved in this cause and that the amount involved exceeds the sum and value of Three Thousand ($3000.00) Dollars exclusive of interest and costs;

That on or about the 24th day of February, 1936, the collision referred to in Plaintiff's Petition occurred resulting in an action being filed against this Answering Defendant in the Common Pleas Court of Cuyahoga County bearing the number, title and the amount shown in said Petition.

This Defendant avers that on December 15th, 1935, prior to the date of the alleged collision, it sold said truck to one Walter Burke and agreed to engage him, as its need arose, to use said truck and said Walter Burke as a hired truckman in the delivery of coal for this Answering Defendant and at the time of sale it was agreed that this Answering Defendant retain title of the truck as security for the payment of the balance of the purchase price thereof;

Denies that it owned said truck at the time of the collision.

This Answering Defendant says that only by reason of Plaintiff's refusal to defend the action instituted in the Common Pleas Court of Cuyahoga County and its rejection of its obligation under said policy and to pay any judgment that may be rendered against this Answering Defendant does the controversy exist.

Wherefore, this Answering Defendant prays that this court adjudge Plaintiff obligated under its policy and for such other and further relief as is just and equitable in the premises and that the costs be assessed against said Plaintiff.

Sol Edgert and B. J. Edgert, Attorneys for Pacific Coal and Oil Company.

(Duly verified.)

[fol. 8] IN UNITED STATES DISTRICT COURT

RULING ON DEMURRER—September 12, 1938

Ruling: "The demurrer will be sustained. Until and unless the defendant Orteca shall have recovered a judgment against defendant Pacific Coal & Oil Company, the question of the plaintiff's obligation under its policy is not presented. A court of competent jurisdiction already has pending before it a suit to determine the Pacific Coal & Oil Company's liability to the defendant Orteca. To permit the plaintiff to proceed with a declaratory judgment suit here is tantamount to depriving the State Court of its jurisdiction and a transferring of the litigation to this court. The Federal Declaratory Judgment Statute was designed to curtail litigation, not to increase it. The fact question of whether the Ford truck was owned or hired by the defendant may never arise and, in any event, the defendant Orteca has the right to a determination of all questions of liability in the forum of his choice. Certainly, the plaintiff is not put to great burden to decide whether it should defend under the terms of its policy. This court had something to say in respect of this general type of proceeding in the recent case of Employers' Liability Assurance Corporation vs. Ryan, et al., No. 5471 in Equity. Exceptions to Plaintiff."

Jones, J.

September 12, 1938.

IN UNITED STATES DISTRICT COURT

ORDER SUSTAINING DEMURRER OF DEFENDANT JOE ORTECA TO PETITION OF PLAINTIFF FOR DECLARATORY JUDGMENT—Entered September 12, 1938.

This day this cause came on to be heard on the demurrer of defendant Joe Orteca to the petition for declaratory judgment, and was submitted to the court; on consideration thereof the court sustained said demurrer, to which ruling of court plaintiff by its attorneys excepts.

[fol. 9] IN UNITED STATES DISTRICT COURT

ORDER OF JUDGMENT—Entered October 3, 1938

This cause came on for further hearing this 3rd day of October, 1938, and defendant, The Pacific Coal & Oil Company, is hereby given leave to withdraw its demurrer and refile its answer heretofore filed in this case, and the entries dated September 27, 1938, sustaining the demurrer of The Pacific Coal & Oil Company and entering judgment in favor of both defendants are hereby vacated.

Plaintiff having elected to plead no further, it is Ordered, Adjudged and Decreed by the Court that judgment be and it is hereby entered in favor of the defendant, Joe Orteca, he to recover of and from plaintiff his costs herein. To which order and judgment the plaintiff duly excepts.

Jones, Judge.

Approved and notice by the Court hereby waived.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff; Edgert & Edgert, Attorneys for Defendant, The Pacific Coal & Oil Company; G. E. Romano and E. J. Thobaben, Attorneys for Defendant, Joe Orteca.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed December 1, 1938

Notice is hereby given that the Maryland Casualty Company, plaintiff herein, hereby appeals to the Circuit Court of Appeals for the Sixth Circuit from the final judgment entered in this action, as against plaintiff and in favor of the defendant, Joe Orteca, on October 3, 1938.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff-Appellant, Maryland Casualty Company, 1250 Terminal Tower Building.

[fol. 10] Bond on appeal for $250.00 approved and filed Dec. 1, 1938, omitted in printing.

[fol. 11] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD—Filed December 1, 1938

The following portions of the record and proceedings are to be contained in the record on appeal:

(1) Petition;
(2) Demurrer of Joe Orteca to petition;
(3) Answer of The Pacific Coal & Oil Company;
(4) The ruling of the Court dated September 12, 1938;
(5) Order dated October 3, 1938;
(6) Notice of appeal, together with the filing date;
(7) Designation;
(8) Plaintiff-appellant's statement of points.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff-Appellant, Maryland Casualty Company.

Service of the above Designation is hereby acknowledged by receipt of copy this 30th day of November, 1938.

Sol Edgert and B. J. Edgert, Attorneys for Defendant-Appellee, The Pacific Coal & Oil Company; G. E. Romano, and E. J. Thobaben, Attorneys for Defendant-Appellee, Joe Orteca.

IN UNITED STATES DISTRICT COURT

STATEMENT OF POINTS—Filed December 1, 1938

Notice is hereby given that Maryland Casualty Company, appellant herein, on this appeal intends to rely upon the question of law raised by the sustaining of the demurrer of the defendant-appellee, Joe Orteca, and the entering of judgment in favor of the defendant-appellee, Joe Orteca, as its only point.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff-Appellant, Maryland Casualty Company.

[fol. 12] Service of the above statement of points is hereby acknowledged by receipt of copy this 21st day of November, 1938.

Sol Edgert and B. J. Edgert, Attorneys for Defendant-Appellee, The Pacific Coal & Oil Company; G. E. Romano and E. J. Thobaben, Attorneys for Defendant-Appellee, Joe Orteca.

IN UNITED STATES DISTRICT COURT

STIPULATION RE CERTIFICATION OF RECORD—Filed December 9, 1938

In accordance with Section 6 of Rule 44 of the general rules of this court, it is hereby agreed that the record as presented to the clerk by the printer may be certified by the clerk as required by law and the rules of the Appellate Court as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause as set forth in the designation of record on appeal without further comparison by the clerk.

Bushnell, Burgess, Fulton & Chandler, Attorneys for Plaintiff-Appellant, Maryland Casualty Company; Sol Edgert and B. J. Edgert, Attorneys for Defendant-Appellee, The Pacific Coal & Oil Company; G. E. Romano and E. J. Thobaben, Attorneys for Defendant-Appellee, Joe Orteca.

[fols. 13-14] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 15] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

CAUSE ARGUED AND SUBMITTED—March 6, 1940

Before Hicks, Allen and Hamilton, JJ.

This cause is argued by Parker Fulton for Appellant and by E. J. Thobaben for Appellees and is submitted to the Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Entered April 8, 1940

Appeal from the District Court of the United States for the Northern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

[fol. 16] In United States Circuit Court of Appeals

Opinion—Filed April 8, 1940

Before Hicks, Allen and Hamilton, Circuit Judges

Allen, Circuit Judge.

The sole question here is whether the District Court erred in sustaining a demurrer to appellant's petition for a declaratory judgment filed under the provisions of Section 400, Title 28, U. S. C.

Appellant issued a liability policy to the Pacific Coal & Oil Company under which it was obligated to defend all actions brought against the assured and, within the limitations of the policy, to pay all sums for which the assured should be liable for property damage or bodily injuries caused by automobiles hired by the assured. While the policy was in effect, appellee Orteca, driving his automobile, collided with a 1931 Ford truck operated by an employee of the Coal Company. Orteca brought suit against the Coal Company in the Common Pleas Court of Cuyahoga County, Ohio, but this action has not proceeded to judgment. The case is thus differentiated from Employees' Liability Assur. Co. v. Ryan, 109 Fed. (2d) 690 (C. C. A. 6).

Appellant brought the instant action in the District Court against the assured and Orteca, asking that the court determine appellant's obligation under the policy and decide whether it is obligated to defend the pending action in the state court. The petition alleged that the Coal Company claims to have sold the 1931 Ford truck to its employee who was operating it at the time of the accident the Coal Company retaining title thereto as security for the payment of the purchase price. If the truck was owned by the company, and was not a hired automobile, appellant claims to have no obligation under the policy. Orteca demurred to the petition in the District Court for the reason that no cause of action against him is stated, and that he is not a necessary or proper party to the action, and the demurrer was sustained.

The determinative factor is whether a controversy exists between Orteca and appellant.

[fol. 17] We think that the judgment of the District Court must be affirmed, upon the ground that no cause of action was stated against Orteca. The controversy which gives jurisdiction to the federal court under the Declaratory Judgment Act does not arise where one claiming that a right or interest is invaded by another has not chosen to assert his right. E. W. Bliss Co. v. Cold Metal Process Co., 102 Fed. (2d) 105, 108 (C. C. A. 6). Orteca does not at present claim a right or interest against appellant, which is not a party to Orteca's action in the state court. No judgment has been rendered in that action against the Coal Company, hence the jurisdictional prerequisites for the filing of the supplemental petition against appellant provided for under Section 9510-4, General Code of Ohio, do not exist. While the circumstances contain "all the elements out of which a controversy may arise" (E. W. Bliss Co. v. Cold Metal Process Co., supra), as between Orteca and appellant the controversy has not yet arisen.

We do not pass upon the question of appellant's right to a declaratory judgment against the assured, as that question is not presented in this appeal.

The judgment is affirmed.

[fol. 18] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 19] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 44543, U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 194. Maryland Casualty Company, Petitioner, vs. Pacific Coal & Oil Company, and Joe Orteca. Petition for writ of certiorari and exhibit thereto. Filed July 1, 1940. Term No. 194 O. T. 1940.

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In the Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 194

MARYLAND CASUALTY COMPANY, a corporation,
Petitioner,

vs.

PACIFIC COAL & OIL COMPANY, a corporation,
and JOE ORTECA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Sixth Circuit, and BRIEF IN SUPPORT OF PETITION.

PACA OBERLIN,
Midland Bldg., Cleveland, Ohio,
Counsel for Petitioner.

M. E. BROOKS,
Williamson Bldg.,
Cleveland, Ohio,

WILLIAM F. STECK,
PARKER FULTON,
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Cleveland, Ohio,
Of Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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MARYLAND CASUALTY COMPANY, a corporation,
Petitioner,

vs.

PACIFIC COAL & OIL COMPANY, a corporation,
and JOE ORTECA,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of the Maryland Casualty Company respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner filed its petition for a declaratory judgment, under Judicial Code Section 274 (d), (28 U. S. C. A. 400), against Pacific Coal & Oil Company and Joe Orteca on August 3, 1938 in the District Court of the United States for the Northern District of Ohio, Eastern Division (R. 2).

It is alleged in said petition that there is diversity of citizenship and that the amount involved exceeds Three Thousand Dollars ($3,000.00), exclusive of interest and costs (R. 2).

The petition further alleges that the Maryland Casualty Company issued to the Pacific Coal & Oil Company a policy of liability insurance, under the terms of which the Maryland Casualty Company obligated itself to defend all actions brought against assured and to pay all sums which assured might become obligated to pay for bodily injuries or destruction of property caused by automobiles

hired by the assured (R. 2); that on February 24, 1936, while said policy was in full force and effect, a collision occurred between an automobile driven by the defendant, Joe Orteca, and a 1931 Ford operated by an employe of the Pacific Coal & Oil Company; that defendant, Joe Orteca, received personal injuries in said collision and filed suit in the Common Pleas Court of Cuyahoga County in the amount of $25,250.00 to recover therefor (R. 4); that a controversy exists as to whether the 1931 Ford was a hired automobile covered by the terms of the Maryland Casualty Company's policy (R. 4); that the Maryland Casualty Company's obligation to defend said action in the state court depended upon whether or not said 1931 Ford was or was not a hired automobile within the meaning of the policy. The prayer then asked the court to declare the rights of the parties (R. 5).

The Pacific Coal & Oil Company filed an answer thereto and Joe Orteca, on August 15, 1938, filed a demurrer (R. 6) upon the ground that no cause of action was stated in the petition as against him, and upon the further ground that he was not a proper party. Joe Orteca's demurrer was sustained by the court September 12, 1938 (R. 8) and plaintiff not desiring to plead further, final judgment was entered on October 3, 1938 in favor of Joe Orteca and against the Maryland Casualty Company (R. 9), from which judgment an appeal was taken to the United States Circuit Court of Appeals for the Sixth Circuit (R. 9). In that Court, on the 8th day of April, 1940, the decision of the District Court was affirmed upon the ground that no cause of action was stated against Orteca (R. 15).

BASIS FOR JURISDICTION.

Petitioner says that Section 240, United States Judicial Code (U. S. C. A. Title 28, Section 347) is the basis upon which petitioner contends that this Court has jurisdiction to review the judgment in question. Said section reads in part as follows:

"(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

* * *

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

Petitioner further says that its suit in the District Court was brought under Section 274 (d) of the Judicial Code (U. S. C. A. Title 28, Section 400) which reads in part as follows:

"(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

THE QUESTION PRESENTED.

Did the Circuit Court of Appeals for the Sixth Circuit err in affirming the judgment of the District Court which sustained a demurrer of the injured claimant who was party defendant to a declaratory judgment suit filed by an insurance company under Judicial Code, Section 274 (d), (28 U. S. C. A. 400), for the purpose of ascertaining its liability under an automobile liability insurance policy

issued by it? The demurrer was sustained on the ground that the injured claimant had previously filed suit in a state court against the assured, also a party to the instant case; that said state court suit had not proceeded to judgment at the time of bringing the declaratory judgment suit; and that, therefore, the insurance company had no cause of action against the injured claimant.

Or, to state the question generally, may an insurer of a defendant's tort liability obtain a declaration of its rights as against an injured claimant before the latter has secured judgment against the assured?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The United States Circuit Court of Appeals for the Sixth Circuit in the instant case has rendered a decision in conflict with the following decisions of other Circuit Courts of Appeals on the same matter:

Maryland Casualty Co. vs. United Corporation of Massachusetts, et al., 111 F. (2d) 443 (1st Circuit, 1940);

Central Surety and Insurance Corporation vs. Norris, et al., 103 F. (2d) 116 (5th Circuit, 1939);

Maryland Casualty Co. vs. Consumers Finance Service, Inc. of Pennsylvania, et al., 101 F. (2d) 514 (3rd Circuit, 1938);

United States Fidelity and Guaranty Co. vs. Pierson, et al., 97 F. (2d) 560 (8th Circuit, 1938).

Furthermore, the question involved in this case arises under the Federal Declaratory Judgments Act and represents an important matter which ought to be settled by this Honorable Court.

PRAYER.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8172, Maryland Casualty Company, a corporation, Plaintiff-Appellant, vs. Pacific Coal & Oil Company and Joe Orteca, Defendants-Appellees, and that the said judgment of the United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MARYLAND CASUALTY COMPANY,
By PACA OBERLIN,
Counsel for Petitioner.

M. E. BROOKS,
WILLIAM F. STECK,
PARKER FULTON,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

MARYLAND CASUALTY COMPANY, a corporation,
Petitioner,

vs.

PACIFIC COAL & OIL COMPANY, a corporation,
and JOE ORTECA,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The decision of the Circuit Court of Appeals was rendered on April 8, 1940 and appears in the Record at page 16. The opinion of the Circuit Court of Appeals is reported at 111 F. (2d) 214.

The decision of the District Court appears at page 8 of the Record. It has not been reported.

JURISDICTION.

In accordance with Rule 38, promulgated by this Court, the ground on which the jurisdiction of this Court is invoked is set forth in the Petition at page 2. For the sake of brevity, the ground is not restated.

STATEMENT OF THE CASE.

In accordance with Rule 38, promulgated by this Court, a summary statement of the case has been given in the Petition at page 1 and in the interest of brevity the statement is not repeated.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in affirming the judgment of the District Court which sustained the demurrer of Respondent, Joe Orteca, to the petition.

ARGUMENT.

The judgment of the District Court was affirmed by the Circuit Court of Appeals on the ground that in a suit for declaratory judgment brought by an automobile liability insurance company against its insured and an injured claimant, the latter having brought suit in a state court, but not yet having obtained judgment therein, a demurrer filed by the injured claimant is properly overruled on the ground that no cause of action is stated against him.

The cases entitled, *Maryland Casualty Co. vs. United Corporation of Massachusetts, et al., Central Surety and Insurance Corporation vs. Norris, et al., Maryland Casualty Co. vs. Consumers Finance Service, Inc. of Pennsylvania, et al.,* and *United States Fidelity and Guaranty Co. vs. Pierson, et al.,* which are listed above at page 4 of the Petition, announce a rule directly contrary to and in conflict with the rule as announced by the Circuit Court of Appeals in the instant case.

The aforementioned cases, decided respectively by the Circuit Courts for the First, Fifth, Third and Eighth Circuits, afford not only the ground for the issuance of a writ of certiorari in this cause but also indicate that, on the merits, the decision of the Circuit Court of Appeals for the Sixth Circuit should be reversed and the cause remanded for further proceedings in the District Court.

Point 1. An Actual Controversy Exists.

That the requisite controversy exists between the parties to this action is apparent from the petition. It sets forth the issuance of an automobile liability policy to the Pacific Coal & Oil Company covering hired automobiles of

the latter. It is then averred in the petition that a collision occurred between an automobile driven by the defendant, Joe Orteca, and a 1931 Ford driven by an employe of the Pacific Coal & Oil Company, as a result of which defendant Orteca received personal injuries and filed suit for the same in the state court. The petition then avers that a controversy exists, involving plaintiff's liability under its policy and its duty to defend the state action now pending, resulting from a dispute as to whether or not the 1931 Ford was a hired car within the meaning of the plaintiff's policy and therefore covered by said policy. (R. 4, 5.)

By the filing of a demurrer, defendant, Joe Orteca, admitted the matters alleged in the petition.

In the case of *Maryland Casualty Company vs. United Corporation of Massachusetts, supra,* the factual situation was identical with that of the case at bar. In holding that the District Court erred in dismissing the complaint on the ground of lack of jurisdiction, Judge Magruder had this to say concerning the existence of a "controversy" at page 446:

> "We think that the present case presents a 'controversy' within the language of the *Haworth* case. There is a dispute between the parties as to the present contractual obligation of the insurer to defend the Assured in the litigation pending in the state court. If the Assured's claim is well founded, the insurance company will be committing a present breach of contract in failing to defend. If the insurer's claim is correct, it has no obligation to defend, because of non-coverage, and it has no concern over the outcome of the state court litigation because even if the Assured is there held liable he is not entitled to indemnity from the insurer. The plaintiff in the present declaratory judgment action having joined as parties defendant the Assured and the Dunham executors who are suing the Assured for damages in the state court, the federal court is in a position to make 'an immediate and

definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged.' It can determine once and for all (1) that the insurer is, or is not, under an obligation to defend the action in the state court; (2) that the Assured if held liable in that action is, or is not, entitled to indemnity from the insurer under the policy, and (3) that if the Dunham executors obtain a judgment against the Assured in the pending cause of action they will, or will not, be entitled to bring proceedings for equitable attachment against the insurer. This certainly seems to be a controversy 'appropriate for judicial determination.' Many cases have so held, on similar facts. *Maryland Casualty Co. v. Consumers Finance Service, Inc.*, 3 Cir., 101 F. 2d 514; *Central Surety & Insurance Corp. v. Norris*, 5 Cir., 103 F. 2d 116; *United States Fidelity & Guaranty Co. v. Pierson*, 8 Cir., 97 F. 2d 560; *Associated Indemnity Corp. v. Manning*, 9 Cir., 92 F. 2d 168."

Judge Magruder also alluded to the leading case of *Aetna Life Insurance Co., v. Haworth*, 300 U. S. 227; 81 L. Ed. 617 (1931) from which we quote the following language (81 L. Ed. at 621):

> "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages."

Point 2. The State Suit Does Not Bar This Action.

In the following cases the pendency of a suit in the state court between the injured party and the assured was held not to deprive the insurer of its right to a declaratory judgment.

Maryland Casualty Co. vs. United Corporation of Mass., et al., supra;

Central Surety and Insurance Corporation vs. Norris, et al., supra;

Maryland Casualty Co. vs. Consumers Finance Service, Inc., of Pennsylvania, et al., supra;

United States Fidelity and Guaranty Co. vs. Pierson, et al., supra;

Farm Bureau Mutual Automobile Insurance Co. vs. Daniel, et al., 92 F. (2d) 838 (4th Circuit, 1937);

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We also respectfully call the Court's attention to the case of *Ryan v. The Employers' Liability Assurance Corporation, Ltd.*, ... U. S. .....; 84 L. Ed. 1008, the same being case No. 967 of the October, 1939 Term of the Supreme Court of the United States. This was a case involving substantially the same facts as in the case at bar, the only exception being that in the *Ryan* case the injured claimant had already taken judgment against the assured in the state court. The District Court dismissed the bill.

The Circuit Court for the Sixth Circuit reversed the judgment and remanded the case. From the Circuit Court's judgment of reversal, one of the defendants sought a writ of certiorari which was allowed by this Honorable Court at the October Term, 1939.

Point 3. Petitioner Has a Cause of Action Against Joe Orteca.

In *Central Surety and Insurance Corporation vs. Norris, et al., supra,* the injured claimants had previously brought suit in the state court. Their suits were pending at the time that the insurer brought its action for a declaratory judgment. The District Judge sustained a motion to dismiss the claimants who had sued in the state court. In reversing the dismissal and remanding the cause for further proceedings, the court said at page 116:

> "The plaintiffs in the two suits pending in the State court should not have been dismissed. While they have not sued the Insurance Corporation, and are not interested in the question whether the Corporation is bound to defend their suits, yet if they win they will, or at least may, implead the Corporation by garnishment or other means to obtain payment of their judgments. In such case the question whether the policy applies will have to be decided again. It would be very inconvenient if the federal court should, these plaintiffs not being parties, decide that the policy does not apply, and the Corporation should not defend the actions and the plaintiffs should recover and then the State court should decide the policy does apply. The interest of Ruddell and Rosser in the question the Insurance Corporation is trying to get adjudicated by a declaratory judgment is real and substantial though not immediate. They ought to be retained as parties to be heard on it and to be bound by the result. *Central Surety & Ins. Corp. v. Caswell,* 5 Cir., 91 F. 2d 607."

In *Maryland Casualty Company vs. Consumers Finance Service, Inc. of Pennsylvania et al., supra,* the facts

were practically identical with those in the preceding case and the case at bar. In holding that the injured claimants were necessary and proper parties, the court said at page 515:

> "It is settled that a controversy between an insurer and its insured as to the extent of the insurer's responsibility under the insurance policy involves the rights of the insurer and will support a declaratory judgment proceeding. *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000; *Columbian Nat. Life Ins. Co. v. Foulke,* 8 Cir., 89 F. 2d 261; *Farm Bureau Mut. Automobile Ins. Co. v. Daniel et al.,* 4 Cir.; 92 F. 2d 838; *Western Casualty & Surety Co. v. Beverforden,* 8 Cir., 93 F. 2d 166; *Maryland Casualty Co. v. Hubbard,* D. C., 22 F. Supp. 697. It is equally clear that in such a proceeding involving an automobile liability policy persons injured in the accident in question are necessary and proper parties."

At page 516 the court said:

> "The only question which will arise in the suits by the injured parties against Finance Service, however, is as to the liability of Finance Service to them. The question as to the duty of the Casualty Company to defend will not be involved and cannot be adjudicated in those proceedings. The company is, therefore, entitled to have the extent of the coverage of its policy declared in the present proceeding. We accordingly conclude that the court below exceeded its discretionary power in dismissing the petition for a declaratory judgment."

In *United States Fidelity and Guaranty Company vs. Pierson et al., supra,* the plaintiff company sought a declaratory judgment for its liability under an automobile policy issued to the defendant Shrigley. The defendant Pierson had filed an action in the state court to recover for bodily injuries caused his wife by the operation of the insured automobile. The Circuit Court of Appeals for the Eighth Circuit reversed the ruling of the trial court which

granted the motions to dismiss, holding that the action was properly brought against all of the defendants, including the injured party.

To the same effect, see *Maryland Casualty Company vs. United Corporation of Massachusetts, supra.*

CONCLUSION.

Petitioner submits that in view of the numerous cases continually arising under the Declaratory Judgments Act and the desirability of securing a uniform rule among the several circuits with respect to questions touching the Act, the writ of certiorari should issue as prayed for by petitioner; and that upon the final determination of this cause on its merits, the judgment of the Circuit Court of Appeals should be dismissed and the cause remanded for further proceedings according to law.

Respectfully submitted,

PACA OBERLIN,

Counsel for Petitioner.

M. E. BROOKS,
WILLIAM F. STECK,
PARKER FULTON,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 194.

MARYLAND CASUALTY COMPANY, a corporation,
Petitioner,

vs.

PACIFIC COAL & OIL COMPANY, a corporation,
and JOE ORTECA,
Respondents.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

THE OPINIONS OF THE COURTS BELOW.

The decision of the Circuit Court of Appeals was rendered on April 8, 1940 and appears in the Record at page 16. The opinion of the Circuit Court of Appeals is reported at 111 F. (2d) 214.

The decision of the District Court appears at page 8 of the Record. It has not been reported.

JURISDICTION.

Petition for a writ of certiorari in this case was granted by this Court on the 14th day of October, 1940.

This suit was originally brought in the District Court of the United States for the Northern District of Ohio, Eastern Division, under Sec. 274(d) of the Judicial Code (28 U. S. C. A. 400), which reads in part as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and

other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

STATEMENT OF THE CASE.

Petitioner filed its petition for a declaratory judgment, under Judicial Code Section 274 (d), (28 U. S. C. A. 400), against Pacific Coal & Oil Company and Joe Orteca on August 3, 1938 in the District Court of the United States for the Northern District of Ohio, Eastern Division (R. 2).

It is alleged in said petition that there is diversity of citizenship and that the amount involved exceeds Three Thousand Dollars ($3,000.00), exclusive of interest and costs (R. 2).

The petition further alleges that the Maryland Casualty Company issued to the Pacific Coal & Oil Company a policy of liability insurance, under the terms of which the Maryland Casualty Company obligated itself to defend all actions brought against assured and to pay all sums which assured might become obligated to pay for bodily injuries or destruction of property caused by automobiles hired by the assured (R. 2); that on February 24, 1936, while said policy was in full force and effect, a collision occurred between an automobile driven by the defendant, Joe Orteca, and a 1931 Ford owned, not hired, by the Pacific Coal & Oil Company, and operated by an employe of the Pacific Coal & Oil Company; that defendant, Joe Orteca, received personal injuries in said collision and filed suit in the Common Pleas Court of Cuyahoga County in the amount of $25,250.00 to recover therefor (R. 4); that a controversy exists as to whether the 1931 Ford was a hired automobile covered by the terms of the Maryland Casualty Company's policy (R. 4); that the Maryland Casualty Company's obligation to defend said action in the state court depended upon whether or not said 1931 Ford was or was not a hired

automobile within the meaning of the policy. The prayer then asked the court to declare the rights of the parties (R. 5).

The Pacific Coal & Oil Company filed an answer thereto and Joe Orteca, on August 15, 1938, filed a demurrer (R. 6) upon the ground that no cause of action was stated in the petition as against him, and upon the further ground that he was not a proper party. Joe Orteca's demurrer was sustained by the court September 12, 1938 (R. 8) and plaintiff not desiring to plead further, final judgment was entered on October 3, 1938 in favor of Joe Orteca and against the Maryland Casualty Company (R. 9), from which judgment an appeal was taken to the United States Circuit Court of Appeals for the Sixth Circuit (R. 9). In that Court, on the 8th day of April, 1940, the decision of the District Court was affirmed upon the ground that no cause of action was stated against Orteca (R. 15).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in affirming the judgment of the District Court which sustained the demurrer of Respondent, Joe Orteca, to the petition.

ARGUMENT.

It is contended by Petitioner that the demurrer interposed by the injured claimant should have been overruled for the reason that Petitioner has a valid cause of action against him under the Federal Declaratory Judgments Act.

1. An Actual Controversy Exists.

That the requisite controversy exists between the parties to this action is apparent from the petition. It sets forth the issuance of an automobile liability policy to the Pacific Coal & Oil Company covering hired automobiles of the latter. It is then averred in the petition that a collision occurred between an automobile driven by the defendant,

Joe Orteca, and a 1931 Ford driven by an employe of the Pacific Coal & Oil Company, as a result of which defendant Orteca received personal injuries and filed suit for the same in the state court. The petition then avers that a controversy exists, involving plaintiff's liability under its policy and its duty to defend the state action now pending, resulting from a dispute as to whether or not the 1931 Ford was a hired car within the meaning of the plaintiff's policy and therefore covered by said policy (R. 4, 5).

By the filing of a demurrer, defendant, Joe Orteca, admitted the matters alleged in the petition.

From the leading case of *Aetna Life Insurance Company vs. Haworth*, 300 U. S. 227, 81 L. Ed. 617, we quote the following language of Mr. Chief Justice Hughes at page 240 (81 L. Ed. 621):

> "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages."

The *Haworth* case was cited by Judge Magruder in *Maryland Casualty Company vs. United Corporation of Massachusetts, et al.*, 111 F. (2d) 443 (1st Circuit, 1940). The latter case involved a factual situation identical with that in the case at bar. In holding that the District Court erred in dismissing the complaint on the ground of lack of jurisdiction, Judge Magruder had this to say concerning the existence of a "controversy" at page 446:

"We think that the present case presents a 'controversy' within the language of the *Haworth* case. There is a dispute between the parties as to the present contractual obligation of the insurer to defend the Assured in the litigation pending in the state court. If the Assured's claim is well founded, the insurance company will be committing a present breach of contract in failing to defend. If the insurer's claim is correct, it has no obligation to defend, because of non-coverage, and it has no concern over the outcome of the state court litigation because even if the Assured is there held liable he is not entitled to indemnity from the insurer, The plaintiff in the present declaratory judgment action having joined as parties defendant the Assured and the Dunham executors who are suing the Assured for damages in the state court, the federal court is in a position to make 'an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged.' It can determine once and for all (1) that the insurer is, or is not, under an obligation to defend the action in the state court; (2) that the Assured if held liable in that action is, or is not, entitled to indemnity from the insurer under the policy, and (3) that if the Dunham executors obtain a judgment against the Assured in the pending cause of action they will, or will not, be entitled to bring proceedings for equitable attachment against the insurer. This certainly seems to be a controversy 'appropriate for judicial determination.' Many cases have so held, on similar facts. *Maryland Casualty Co. v. Consumers Finance Service, Inc.*, 3 Cir., 101 F. 2d 514; *Central Surety & Insurance Corp. v. Norris*, 5 Cir., 103 F. 2d 116; *United States Fidelity & Guaranty Co. v. Pierson*, 8 Cir., 97 F. 2d 560; *Associated Indemnity Corp. v. Manning*, 9 Cir., 92 F. 2d 168."

At this juncture, it will be profitable to refer to Section 9510-4 of the Ohio General Code, mentioned in the Circuit Court's opinion at page 215. That section reads as follows:

"SEC. 9510-4. *Insurance money applied to judgment, when; insurer as party defendant.* Upon the

recovery of a final judgment against any firm, person or corporation by any person, including administrators and executors, for loss or damage on account of bodily injury or death, for loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage on account of loss or damage to tangible or intangible property of any person, firm, or corporation, for loss or damage to a person on account of bodily injury to his wife, minor child or children if the defendant in such action was insured against loss or damage at the time when the rights of action arose, the judgment creditor or his successor in interest shall be entitled to have the insurance money provided for in the contract of insurance between the insurance company and the defendant applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor or his successor in interest, to reach and apply the insurance money to the satisfaction of the judgment, may file in the action in which said judgment was rendered, a supplemental petition wherein the insurer is made new party defendant in said action, and whereon service of summons upon the insurer shall be made and returned as in the commencement of an action at law. Thereafter the action shall proceed as to the insurer as in an original action at law."

The opinion of Judge Magruder in the case of *Maryland Casualty Company vs. United Corporation of Massachusetts, supra;* did not indicate whether the State of Massachusetts has a statute similar to the Ohio statute cited above. Presumably not, in view of the reference, at page 446 of the opinion, to the injured claimant's right to bring proceedings for equitable attachment against the insured. However, it is submitted that this constitutes a distinction without a real difference between the two cases. The Ohio statute merely gives a successful plaintiff the right to reach an unsuccessful defendant's insurer in the same suit.

2. The State Suit Does Not Bar This Action.

In the following cases the pendency of a suit in the state court between the injured party and the assured was held not to deprive the insurer of its right to a declaratory judgment.

Maryland Casualty Co. vs. United Corporation of Massachusetts, et al., 111 F. (2d) 443 (1st Circuit, 1940);

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granted the motions to dismiss, holding that the action was properly brought against all of the defendants, including the injured party.

To the same effect, see *Maryland Casualty Company vs. United Corporation of Massachusetts, supra.*

Respectfully submitted,

PARKER FULTON,
Counsel for Petitioner,

M. E. BROOKS,
WILLIAM F. STECK,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 194.—October Term, 1940.

Maryland Casualty Co., Petitioner, *vs.* Pacific Oil & Coal Co., and Joe Orteca, Respondents.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 3, 1941.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner issued a conventional liability policy to the insured, the Pacific Oil & Coal Co., in which it agreed to indemnify the insured for any sums the latter might be required to pay to third parties for injuries to person and property caused by automobiles hired by the insured. Petitioner also agreed that it would defend any action covered by the policy which was brought against the insured to recover damages for such injuries.

While the policy was in force, a collision occurred between an automobile driven by respondent Orteca and a truck driven by an employee of the insured. Orteca brought an action in an Ohio state court against the insured to recover damages resulting from injuries sustained in this collision. Apparently this action has not proceeded to judgment.

Petitioner then brought this action against the insured and Orteca. Its complaint set forth the facts detailed above and further alleged that at the time of the collision the employee of the insured was driving a truck sold to him by the insured on a conditional sales contract. Petitioner claimed that this truck was not one "hired by the insured" and hence that it was not liable to defend the action by Orteca against the insured or to indemnify the latter if Orteca prevailed. It sought a declaratory judgment to this effect against the insured and Orteca, and a temporary injunction restraining the proceedings in the state court pending final judgment in this suit.

Orteca demurred to the complaint on the ground that it did not state a cause of action against him. The District Court sus-

tained his demurrer and the Circuit Court of Appeals affirmed. 111 F. (2d) 214. We granted certiorari on October 14, 1940, to resolve the conflict with the decisions of other Circuit Courts of Appeals cited in the note.[1]

The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed in its complaint. This raises the question whether there is an "actual controversy" within the meaning of the Declaratory Judgment Act (Judicial Code § 274d, 28 U. S. C. § 400), since the District Court is without power to grant declaratory relief unless such a controversy exists. *Nashville, etc. Ry. Co.* v. *Wallace*, 288 U. S. 249, 259; U. S. C. A. Constitution, Art. III, § 2.

The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239-242. It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case. *Nashville, etc. Ry. Co.* v. *Wallace, supra*, p. 261.

That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy, and sections 9510-3 and 9510-4 of the Ohio Code (Page's Ohio General Code, Vol. 6, §§ 9510-3, 9510-4) give Orteca a statutory right to proceed against petitioner by supplemental process

[1] Maryland Casualty Co. *v.* United Corporation, 111 F. (2d) 443; Central Surety & Insurance Corp. *v.* Norris, 103 F. (2d) 116; Maryland Casualty Co. *v.* Consumers Finance Service, Inc., 101 F. (2d) 514; Aetna Casualty & Surety Co. *v.* Yeatts, 99 F. (2d) 665; U. S. Fidelity & Guaranty Co. *v.* Pierson, 97 F. (2d) 560; Associated Indemnity Corp. *v.* Manning, 92 F. (2d) 168. See also, Ryan *v.* Employers' Liability Assurance Corp., Ltd., 109 F. (2d) 690; C. E. Carnes & Co. *v.* Employers' Liability Assurance Corp., Ltd., 101 F. (2d) 739; Standard Accident Insurance Co. *v.* Alexander, Inc., 23 F. Supp. 807; U. S. Fidelity & Guaranty Co. *v.* Pierson, 21 F. Supp. 678; Builders & Manufacturers Mutual Casualty Co. *v.* Paquette, 21 F. Supp. 858; Travelers Insurance Co. *v.* Young, 18 F. Supp. 450; Commercial Casualty Insurance Co. *v.* Humphrey, 13 F. Supp. 174.

and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition. Compare *Maryland Casualty Co.* v. *United Corporation,* 111 F. (2d) 443, 446; *Central Surety & Insurance Corp.* v. *Norris,* 103 F. (2d) 116, 117; *U. S. Fidelity & Guaranty Co.* v. *Pierson,* 97 F. (2d) 560, 562. Moreover, Orteca may perform the conditions of the policy issued to the insured requiring notice of the accident, notice of suit, etc., in order to prevent lapse of the policy through failure of the insured to perform such conditions. *Hartford Accident & Indemnity Co.* v. *Randall,* 125 Oh. St. 581; see also, *Lind* v. *State Automobile Mutual Insurance Association,* 128 Oh. St. 1; *State Automobile Mutual Insurance Association* v. *Friedman,* 122 Oh. St. 334.

It is clear that there is an actual controversy between petitioner and the insured. Compare *Aetna Life Ins. Co.* v. *Haworth, supra.* If we held contrariwise as to Orteca because, as to him, the controversy were yet too remote, it is possible that opposite interpretations of the policy might be announced by the federal and state courts. For the federal court, in a judgment not binding on Orteca might determine that petitioner was not obligated under the policy, while the state court, in a supplemental proceeding by Orteca against petitioner, might conclude otherwise. Compare *Central Surety & Insurance Corp.* v. *Norris, supra,* p. 117; *Aetna Casualty & Surety Co.* v. *Yeatts,* 99 F. (2d) 665, 670.

Thus we hold that there is an actual controversy between petitioner and Orteca, and hence, that petitioner's complaint states a cause of action against the latter. However, our decision does not authorize issuance of the injunction prayed by petitioner. Judicial Code § 265, 28 U. S. C. § 379; see *Central Surety & Insurance Corp.* v. *Norris, supra,* p. 117; *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.,* 101 F. (2d) 514, 516; *Aetna Casualty & Surety Co.* v. *Yeatts, supra,* p. 670.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Mr. Justice BLACK did not participate in the consideration or decision of this case.